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No. 78-79

Supreme Court, U.S.  
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*In the Supreme Court of the United States*

OCTOBER TERM, 1978

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GENERAL DYNAMICS CORPORATION, PETITIONER

v.

RAY MARSHALL, SECRETARY OF LABOR, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE EIGHTH CIRCUIT*

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MEMORANDUM FOR THE RESPONDENTS

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WADE H. MCCREE, JR.,  
*Solicitor General,*  
*Department of Justice,*  
*Washington, D.C. 20530.*

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1. Petitioner, a government contractor, filed Affirmative Action Programs for two of its divisions with the Maritime Administration of the Department of Commerce and the Defense Logistics Agency of the Department of Defense. The Affirmative Action Programs were submitted to these agencies in accordance with the requirements of Executive Order 11246, as amended, 30 Fed. Reg. 12319, and regulations promulgated by the Secretary of Labor (Pet. App. A-3 to A-4).<sup>1</sup>

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<sup>1</sup>Executive Order 11246 provides that the Secretary of Labor is to implement the federal equal employment opportunity policies set out in the order. The Secretary has delegated this responsibility to the Office of Federal Contract Compliance Programs (OFCCP). The OFCCP, in turn, has designated various federal agencies as "compliance agencies" to monitor the equal employment activities of various government contractors. The Maritime Commission is the compliance agency for petitioner's Electric Boat Division. The Defense Logistics Agency is the compliance agency for petitioner's Convair Division.

In June 1975 requests were made to the Maritime Administration and the Defense Logistics Agency for disclosure of petitioner's Affirmative Action Programs for its Electric Boat and Convair Divisions. The agencies informed petitioner about the requests and stated they had determined to disclose much of the requested materials. The OFCCP affirmed both decisions (*ibid.*).

Petitioner brought this action in the United States District Court for the Eastern District of Missouri; it asked the court to bar the disclosure of the materials in issue (Pet. App. A-2). The district court entered an injunction forbidding disclosure of the materials. The court held that the materials "contain commercial and financial information of a confidential nature" and that disclosure is prohibited by exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4), and by the Trade Secrets Act, 18 U.S.C. 1905 (Pet. App. A-14 to A-22).

The court of appeals reversed, holding that neither the Freedom of Information Act nor the Trade Secrets Act provides a private cause of action to enjoin the disclosure of materials in the possession of federal agencies (Pet. App. A-6 to A-9). In any event, the court held that the contemplated disclosures, if authorized by OFCCP disclosure regulations, would not violate the substantive standards of the Trade Secrets Act (Pet. App. A-9 to A-10). Finally, the court held that although petitioner would be entitled to judicial review of the agency's determination to release the materials, that review would not be *de novo* in the district court, but would be conducted on the administrative record and would be subject to the standards of review prescribed by the Administrative Procedure Act, 5 U.S.C. 706 (Pet. App. A-10 to A-11). Because the administrative record was inadequate to reveal whether the OFCCP had considered that the material was exempt from mandatory disclosure under the Freedom of Information Act and

whether it had determined under its regulations that disclosure of the materials was in the public interest and would not impede the discharge of agency functions, the court remanded the case to the district court for further proceedings, including possible supplementation of the record in that court or a further remand to the OFCCP (Pet. App. A-11 to A-12).

2. Petitioner takes issue with each of the three major points resolved by the court of appeals: it argues that materials falling within the scope of exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4), may not be disclosed by federal agencies; it argues that the Department of Labor regulations do not provide the legal authorization necessary to exempt the disclosures from the prohibitions of the Trade Secrets Act; and it argues that a submitter of information is entitled to *de novo* district court review of an agency's decision to release materials that the submitter claims are protected from disclosure by either exemption 4 of the Freedom of Information Act or the Trade Secrets Act.

The same issues are pending before this Court in the nearly identical case of *Chrysler Corp. v. Brown*, No. 77-922, certiorari granted March 6, 1978. Both cases involve requests for a government contractor's Affirmative Action Programs; both involve the applicability of the Freedom of Information Act and the Trade Secrets Act to disclosures authorized by OFCCP regulations; and both raise the question of the proper standard of review of "reverse FOIA" claims in district court.

It is therefore respectfully submitted that the Court should hold this petition for disposition in light of its decision in *Chrysler Corp. v. Brown*.

WADE H. MCCREE, JR.,  
*Solicitor General.*

SEPTEMBER 1978.